ON FILE
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Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

—v.—

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

UNITED STATES SENATE,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion For Leave To File And BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association (the "ABA" or the "Association") respectfully moves pursuant to Rule 36.3 of the Rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of action taken by the Executive in execution of a statute is unconstitutional. Counsel for petitioner United States Senate, appellant and respondent United States of America, and appellee and respondent Jagdish Rai Chadha have consented to the filing of this brief. The consent of counsel for petitioner United States House of Representatives was requested but refused.

This case presents to the Court for the first time the question of the constitutionality of a "legislative veto". *Cf. Buckley v. Valeo,* 424 U.S. 1, 140 n.176 (1976). *See also Clark v. Valeo,* 559 F.2d 642, 647 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977). To date, Congress has enacted hundreds of veto provisions, most of them during the last decade. A number of these apply to rulemaking by administrative agencies. Bills are being actively considered by Congress which would apply a legislative veto across the board to all administrative rulemaking.

The American Bar Association, a national organization of lawyers, has a special interest in this matter—not only because of its charter to "uphold and defend the Constitution and maintain representative government" but also because the legislative veto, particularly in its increasingly frequent application to rulemaking subject the Administrative Procedure Act (the "APA"), directly affects the practice of its members before federal administrative agencies. The ABA was actively involved in drafting, and prompting congressional consideration of, the legislation that was ultimately enacted as the APA in 1946. Through one of its standing sections, the Section of Administrative Law, the Association monitors the effectiveness of the APA and has suggested numerous amendments to the act in the interest of improving the administrative process. In 1975 the ABA established a special Commission on Law and the Economy, composed of lawyers and economists and chaired by

John J. McCloy,* to study the impact of governmental regulation upon the national economy. The Commission's conclusions were adopted by the Association's House of Delegates, and its final report was issued in 1979.

One of the important conclusions reached in the Commission's report was that general use of the legislative veto poses a serious threat to effective regulatory administration and fundamental constitutional principles. *See* ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform* 88-91 (1979). Representatives of the Association have testified before Congress in opposition to bills proposing to establish an across-the-board legislative veto.

The basis of the Court's decision in this case will be of great importance in guiding Congress and the Executive Branch concerning future use of the legislative veto. Even if respondent Chadha chooses to address those constitutional defects of the device that extend beyond its use in agency adjudication of the sort immediately involved, the Court will be assisted, the ABA believes, by the broad perspective, based upon years of study and experience in all aspects of the administrative process, which this *amicus* can provide. While that study and experience are no doubt matched by the Executive, the Solicitor General may not choose to make all the available arguments; he may not point out, for example, that a vice of the legislative veto sometimes consists not in a reduction but rather in an augmentation of executive power.

The ABA believes that the attached brief will be of assistance to the Court in its consideration of the constitutional

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* The other members of the Commission were Richard B. Smith, Vice Chairman; Elliot Bredhoff, William T. Coleman, Jr., Lloyd N. Cutler, Harry T. Edwards, Henry J. Friendly, F. Mark Garlinghouse, C. David Ginsburg, Rhoda H. Karpatkin, Charles Kirbo, William T. Lifland, Paul MacAvoy, John R. Meyer, Ira Millstein, Roswell B. Perkins, H. Chapman Rose, Sherwin P. Simmons, Albert T. Sommers, Michael Sovern, Edmund A. Stephan, Thomas B. Stoel, Jr., Randolph W. Thrower, Phyllis A. Wallace, Francis M. Wheat, and Richard E. Wiley.

issues raised and therefore requests leave to file the annexed brief as *amicus curiae.*

Dated: January 8, 1982

Respectfully submitted,

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BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association respectfully submits this brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of actions taken by the Executive in execution of a statute is unconstitutional.

Interest of Amicus Curiae

The interest of the American Bar Association (the "ABA" or the "Association") is set forth in the preceding Motion for Leave to File this brief.

Introduction

Petitioners have sought to portray this case as involving a unique and distinctive statutory provision which, while falling within a general class called "legislative veto", can only be assessed individually in light of its own peculiar history and purpose. Such an approach, which would eschew any generally applicable basis of decision, ignores the compelling need for guidance by this Court. It would effectively condemn the administrative process to continued impairment by the legislative veto into the indefinite future.

Hundreds of legislative veto provisions have been enacted, most within the last decade. These include one-house vetoes,[1] two-house vetoes,[2] so-called one-and-one-half-house vetoes,[3] what might be called reverse vetoes (*i.e.*, requirements for concurrent resolutions of *approval* before agency action becomes effective),[4] two-house vetoes by two-thirds vote,[5] even

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1 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

2 *See, e.g.*, Federal Trade Commission Improvements Act of 1980, § 21, 94 Stat. 374, 15 U.S.C. § 57a-1 (1980).

3 *See, e.g.*, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207(a), 95 Stat. 718 (1981) (veto by one house invalidates executive action unless other house affirmatively approves).

4 *See, e.g.*, Export-Import Bank Amendments of 1974, § 8, 88 Stat. 2336, 12 U.S.C. § 635e(b) (1975).

5 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958), reduced to a simple majority of each house by Trade Expansion Act of 1962, § 351(a) (2) (B), 76 Stat. 899, 19 U.S.C. § 1981(a) (2) (B) (1962).

vetoes that alternate from one house to the other[6] or change from one-house to two-house[7] depending on the nature of the issue involved.

As to triggering mechanisms, Congress has enacted veto provisions activated automatically whenever the Executive takes certain action,[8] veto provisions triggered only by disagreement regarding the action between the President and an independent agency,[9] or between the President and one of his subordinates,[10] veto provisions activated by congressional committee disapproval,[11] and even negative veto provisions (requirement of resolution of approval) triggered by congressional committee disapproval.[12]

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6 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

7 *Compare, e.g.*, District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c) (1), 87 Stat. 814 (1973) (certain District actions subject to disapproval by both houses acting concurrently), *with id.* at § 602(c) (2) (other District actions subject to disapproval by either house acting alone).

8 See, for example, the legislative veto at issue in the present case.

9 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958). According to the Senate Committee report, "[t]he committee did . . . agree that Congress might well be the adjudicator when the President differs with the Tariff Commission, especially since the original constitutional responsibility and jurisdiction is vested in the Congress." S. Rep. No. 1838, 85th Cong., 2d Sess. 4 (1958).

10 *See, e.g.*, Department of Defense Appropriation Authorization Act of 1975, § 709(c), 88 Stat. 408, 50 U.S.C. app. § 2403-1(c) (1975) (President may approve export application, despite Secretary of Defense's contrary recommendation, unless Congress adopts concurrent resolution of disapproval).

11 *See, e.g.*, Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514 (1958).

12 *See, e.g.*, Colorado River Basin Salinity Control Act, § 208(a), 88 Stat. 274, 43 U.S.C. § 1598(a) (1974).

As to subject matter, some legislative veto provisions affect the very content of legislation, by permitting the President to amend it (absent legislative veto),[13] by eliminating entirely the powers that it confers,[14] by eliminating the powers that it confers on a selective[15] or section-by-section basis,[16] or even by altering (as opposed to merely eliminating) statutory provisions.[17] Those more numerous legislative veto provisions that seek to affect executive application of the law rather than the law itself may apply to the exercise of delegated authority that is merely permissive,[18] or delegated authority that is mandatory,[19] or authority that is not delegated at all but is part of the President's inherent Article II powers (although controllable to some degree by Congress).[20]

As to those whose actions are subject to legislative vetoes, they range from the President, to the President's subordinates, to the heads of independent agencies, to federally chartered corporations, and even to this Court itself (*see* page 20 *infra*).

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13 *See, e.g.*, Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414 (1932).

14 *See, e.g.*, Act to Promote the Defense of the United States, ch. 11, 55 Stat. 32 (1941).

15 *See, e.g.*, Mutual Defense Assistance Act of 1949, ch. 626, § 405(d), 63 Stat. 718 (1949).

16 *See, e.g.*, The Defense Production Act of 1950, ch. 932, § 716(c) (2), 64 Stat. 822 (1950).

17 *See, e.g.*, Universal Military Training and Service Act, Pub. L. No. 82-51, § 1(j), 65 Stat. 80 (1951).

18 See, for example, the authority at issue in the present case, which may be exercised by the Attorney General "in his discretion". Immigration and Nationality Act, § 244(a), 66 Stat. 216, 8 U.S.C. § 1254(a) (1952).

19 *See, e.g.*, Presidential Recordings and Materials Preservation Act, § 104, 88 Stat. 1696, 44 U.S.C. § 2107 note (1974).

20 *See, e.g.*, War Powers Resolution, § 5(b), 87 Stat. 556, 50 U.S.C. § 1544(b) (1973).

In urging the Court to regard this case as presenting an individualized determination, petitioners are in effect suggesting that this proliferating collection of legislative veto provisions be inspected and classified one by one, even though only one (Section 244(c)) has been brought to the bar of this Court in the 49 years since enactment of the first such provision. The volume of enacted legislative veto provisions and the increasing exercise of them are a sufficient circumstance for urging the Court's resolution of the underlying issues in this case. It is the ABA's position that the constitutional infirmities of Section 244(c) are neither created by, nor can be validated by, its own peculiar history and purpose, but rather arise from the generic invalidity of the legislative veto device. A decision which recognizes this invalidity can prevent continued harm to our constitutional system in general and our system of administrative law in particular. By correcting Congress's misapprehensions,[21] the Court can eliminate the necessity for the Executive to make, statute by statute, the governmentally disruptive choice of either observing the veto or appearing to disregard the law.

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21 The absence of any decision by this Court that the legislative veto is unconstitutional has been argued in Congress to be an indication that the legislative veto is constitutional. *See, e.g.*, S. Rep. No. 96-184, 96th Cong., 1st Sess. 18 (1979) (additional views of Senators Schmitt and Goldwater):

> . . ."It is clear, however, that if [the legislative veto] were unconstitutional, we would surely know it by now: since 1932, Congress has enacted over 295 provisions of law with legislative review or veto powers. On those occasions where the veto has been challenged in court, it has not been ruled unconstitutional."

Summary of Argument

As shown in the Introduction, there is compelling need for guidance by the Court in this field. Congress has enacted literally hundreds of legislative veto provisions without authoritative determination of their validity. A decision that appropriately sets forth a clear, generally applicable principle to determine the validity of this form of congressional action can eliminate this harmful uncertainty.

As shown in Point I, the legislative veto violates the principle of separation of powers. That doctrine not only protects, but pre-eminently protects, the Executive obligation to "take care that the Laws be faithfully executed." In principle, unilateral congressional control of implementation of a statute represents an impairment of that function. In practice, the effect of the veto—as exemplified by its application to administrative rule-making—has significantly disrupted the Executive's performance of its function.

As shown in Point II, the legislative veto represents an attempt to avoid the constitutional requirement that legislation be enacted by both houses of Congress and presented to the President for his signature. Whether viewed as involving the invalidation of executive action or the acceptance of executive "recommendations", the legislative veto produces congressional action that is legislative in character and effect. It therefore requires observance of the constitutionally prescribed procedures for legislation.

As shown in Point III, the legislative veto is invalid whether or not, in the particular case, it deprives the President of powers he would otherwise possess, and regardless of whether he acquiesces in, or even urges, its creation. The constitutionally required procedures for legislation were intended not only to protect the Executive from the Congress, but to protect the people from the two branches combined.

As shown in Point IV, there is no unique or irreplaceable legitimate function served by the legislative veto. It is not a necessary, or even an effective, means of assuring appropriate congressional control.

ARGUMENT

I

THE LEGISLATIVE VETO VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

Both petitioners in this case attempt to portray the central issue, on the merits, as one of separation of powers rather than the observance of constitutionally mandated legislative procedures. The House brief devotes less than three pages to the latter issue (House Br. 39-41), and the Senate brief explicitly states the view that "the fundamental issue in this case, if the merits should be reached, is the separation of powers and not issues of legislative formalities." (Senate Br. 32.) As discussed in Point II below, the ABA does not agree with this analysis, but even if it were correct, the legislative veto is invalid on separation-of-powers grounds alone.

As this Court explained in *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881):

> . . ."It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This constitutional principle is of special importance in its application to the Legislative Branch.[22]

> "The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroach-

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22 "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

ments which it makes on the co-ordinate departments." *The Federalist*, No. 48, at 334 (J. Cooke ed. 1961) (J. Madison).

A. Governmental Functions Delegated to the Executive Are Protected by the Doctrine of Separation of Powers

The House brief (House Br. 25-26) asserts that the separation of powers doctrine is violated by Congress only if Congress interferes with some executive function *other than* the obligation to "take care that the Laws be faithfully executed" (Art. II, § 3). This in fact reverses the main thrust of the doctrine. The execution of laws enacted by Congress is the very *core* of the Executive's responsibility, as the title "Executive" alone should suggest. And it is precisely *when* the President is executing laws enacted by Congress that the need for clear separation of powers is most pronounced. The passage from Montesquieu, quoted in *The Federalist* to provide a "demonstration of the meaning" of separation of powers, reads:

> "When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." *The Federalist*, No. 47, at 326 (J. Cooke ed. 1961) (J. Madison, quoting Montesquieu, *The Spirit of Laws*) (emphasis in original).

The House and Senate briefs attempt to avoid the force of this principle by seeking to equate it with "the discredited notion that the separation doctrine means total separation of each of the three great functions of government" (House Br. 22; *see* Senate Br. 34). It is not the same. The issue is not whether, as the House brief puts it (House Br. 24), Congress may "blend and mix" the functions of government. It assuredly may—by delegating to the Executive, for example, functions of a characteristically legislative or judicial nature. Rather, the issue is whether, once functions of whatever nature have been delegated, Congress may continue to exercise and control them unilaterally as though they were still within its

own domain. A principle of "blending and mixing" in this sense would amount to a nullification of the doctrine of separation of powers.[23]

Congress may constitutionally confer upon the Executive a wide range of governmental functions, but, once conferred, they are insulated from direct congressional control except through the process of legislation.

B. The Legislative Veto Disrupts Executive Functions

Not all congressional impingement upon executive action violates the doctrine of separation of powers. The test, as expressed by this Court, is whether the congressional action "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977).

The result of that test applied to a legislative veto should be clear, since the purpose and effect of the legislative veto is to transfer back to one or both houses of Congress dispositive control of implementation of a statute. Nonetheless, the ABA wishes to call the Court's attention to the concrete, disruptive effects of the legislative veto, particularly in the critical context of agency rulemaking.

• Experience with the actual operation of the legislative veto has shown that it produces an *ad hoc*, after-the-fact, piecemeal approach to the formulation of general policy.[24] The

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[23] Such unilateral congressional control is impermissible whether or not the delegated functions are of a characteristically legislative or judicial nature. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Federal Election Commission's "broad administrative powers" (*id.* at 140), including rulemaking, though conceded to be "more legislative and judicial in nature than . . . the Commission's enforcement powers" (*id.* at 140-41), were nonetheless held to trigger the President's exclusive constitutional prerogative to appoint "officers of the United States" within the meaning of Article II, section 2, clause 2 of the Constitution. The approach of that case is inconsistent with the notion that the Constitution's structural division of powers is somehow altered when "blended and mixed" functions are at issue.

[24] *See, e.g.*, Symposium, *1976 Bicentennial Institute—Oversight and Review of Agency Decisionmaking*, 28 Ad. L. Rev. 569, 581 (1976) (state-

veto of a rule belonging to an integrated regulatory scheme leaves only a void which can distort or even destroy a comprehensive program.[25] It permits Congress to avoid the difficult task of devising an alternative rule, while providing little guidance to an agency seeking to fulfill its statutory mandate.[26]

• The legislative veto inevitably increases delay and uncertainty in the administrative process.[27] Such delay infects rulemaking prior to the submission of rules to Congress, as agency staffs engage in protracted, tripartite negotiations with committee staffs of both houses, or as agencies await a politically propitious moment for the submission of rules. In order to avoid the possibility of a rule veto, agencies may choose to formulate their policy through case-by-case adjudication rather than notice-and-comment rulemaking, with consequently reduced guidance to the regulated. Disapproval of a rule halts the process of governing when an agency and either house differ irreconcilably over statutory interpretation or administrative policy. Even agency rules that are not disapproved bear

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ment of Roderick M. Hills, Chairman of the SEC); *id.* at 671, 698-99 (statement of Marcus A. Rowden, Commissioner, Nuclear Regulatory Commission).

25 *See, e.g.*, Senate Committee on Government Operations, *Study on Federal Regulation II: Congressional Oversight of Regulatory Agencies*, S. Doc. No. 26, 95th Cong., 1st Sess. [hereinafter *"Study on Federal Regulation II"*] 120 (1977); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Anderson).

26 *See, e.g., Study on Federal Regulation II* at 120 (testimony of Lloyd N. Cutler).

27 *See, e.g.*, 126 Cong. Rec. S1090 (Feb. 6, 1980) (remarks of Senator Muskie); *Study on Federal Regulation II*, at 118-19; *Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Committee on Government Operations*, 94th Cong., 2d Sess. [hereinafter *"S. 2258 Hearings"*] 545 (1976) (statement of Roderick M. Hills, Chairman of the SEC); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1379-80, 1397, 1400 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146-47 (1977).

the hidden cost of postponed implementation during the review period. With delay comes uncertainty as to the form and effective date of regulations, a burden borne by all who must plan and act on the basis of governmental decisions.

• The legislative veto tends to undermine notice-and-comment rulemaking subject to the safeguards of the APA, replacing it with informal negotiations between the agencies and the staffs of congressional committees.[28] These negotiations can take on a life of their own, leading to the effective, if not readily recognized, amendment of statutes. While apparent power lies in agencies going through the process of public rulemaking, actual power is wielded by committee staffs operating beyond the public eye.

• Even if a congressional committee were disposed to review all the agency rules committed to its charge by a legislative veto provision, and even if staff attention were deemed an adequate substitute for personal consideration by elected representatives, a staff large enough to conduct the task is not likely to be available.[29] In fact, however, congressional intervention through the threat or exercise of a legislative veto has been sporadic and unpredictable, often responding to the political strength of the interests affected by the proposed rule.[30] There

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28 *See, e.g.*, 126 Cong. Rec. S1096 (Feb. 6, 1980) (remarks of Senator Ford); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1377-78, 1404, 1412-14, 1417-20 (1977).

29 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1095 (remarks of Senator Ribicoff); 122 Cong. Rec. 31636 (Sept. 21, 1976) (remarks of Representative Frenzel); *id.* at 31639 (remarks of Representative Bingham); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1415 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146 (1977).

30 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1081 (remarks of Senator Biden); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Bingham); *S. 2258 Hearings*, at 496 (statement of Karl E. Bakke, Chairman of the FMC); *id.* at 547 (statement of Roderick M. Hills, Chairman of the SEC).

is no standard for exercise of a legislative veto and no discipline to assure consistency of treatment from one session of Congress to the next.

• The judicial review stage of the rulemaking process is also impaired. When Congress disapproves a rule on the ground that the rule is not in accord with the authorizing statute's intent, it in effect preempts the judicial review function. Moreover, when a court reviews under Section 706 of the APA a rule that has passed challenge in the Congress, the court will be reluctant to apply normal standards—perhaps appropriately so if petitioners' theory that the failure to veto constitutes congressional "acceptance" of a "recommendation" is to be credited.

Some examples of the legislative veto in operation make these adverse effects clear:

1. In *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), this Court had before it the Presidential Recordings and Materials Preservation Act, Title I, 88 Stat. 1695, 44 U.S.C. § 2107 note (1974). The act required the Administrator of General Services to submit to Congress proposed regulations governing public access under the act and provided that they would be ineffective if disapproved by either house.

Notwithstanding the Administrator's compliance with the requirement that he submit the proposed regulations within 90 days of the enactment of the act, no regulations were yet in effect two and one-half years later when this Court rendered its opinion. The Court described the genesis of this deadlock as follows:

> . . . "The initial set [of regulations] proposed by the Administrator was disapproved pursuant to § 104(b) (1) by Senate Resolution. . . . The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. . . . The House disapproved six provisions of a third set. . . . The Administrator is of the view that regulations cannot become effective except as a

package and consequently is preparing a fourth set for submission to Congress." 433 U.S. at 437 (citations omitted).

2. Another example of the actual workings of the legislative veto is provided by the Federal Election Campaign Act of 1971,[31] as amended by the Federal Election Campaign Act Amendments of 1974.[32]

By the time of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), holding that the appointment of four members of the Federal Election Commission by Congress pursuant to the 1974 amendments violated the doctrine of separation of powers,[33] the Federal Election Commission had already produced rules to implement the 1974 amendments. One of these had provided for initial filing of reports of contributions and expenditures with the Commission, with copies to be forwarded to the Senate and the House. The House had vetoed that proposed rule on the ground that it conflicted with the provision of Section 438(d) of the act that reports were to be "received by" the Clerk of the House and the Secretary of the Senate "as custodian for the Commission."[34]

The Commission had also proposed a rule to the effect that contributions received by an incumbent federal officeholder to defray the costs of office were subject to the statutory limitations on contributions and expenditures. 40 Fed. Reg. 32951 (1975). A Senate committee had criticized this, whereupon the Commission had submitted a revised proposal.[35] This had been

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31 Pub. L. No. 92-225, 86 Stat. 3 (1972).

32 Pub. L. No. 93-443, 88 Stat. 1263 (1974).

33 The Court expressly noted that it was not passing upon the constitutionality of the legislative veto provisions of the 1974 amendments. 424 U.S. at 140 n.176.

34 H.R. Res. No. 780, 94th Cong., 1st Sess.; 121 Cong. Rec. 33664-74, 33699 (1975).

35 S. Rep. No. 94-409, 94th Cong., 1st Sess. 2 (1975).

rejected by the Senate,[36] its committee having concluded that the Commission "may have exceeded" its statutory authority.[37]

When the Federal Election Commission was reconstituted after this Court's decision in *Buckley v. Valeo*, it proposed new regulations[38] and held a series of informational meetings in various regions of the country, as well as formal hearings. Nevertheless, because of the legislative veto provisions, no regulations had become effective by the time of the 1976 election:

> "Despite the FEC's careful preparation, or perhaps because of it, the proposed regulations were again negated by Congress. This time, however, there was no open vote on a veto resolution in one of the houses of Congress, but a legislative version of the 'pocket veto.' When the Ninety-Fourth Congress adjourned *sine die* on October 1, 1976, the FEC's rules had lain before it for only twenty-eight of the required thirty legislative days. Congress had rejected requests by the Commission that it remain in session for two more days so that the rules could take effect before the 1976 elections; thus the rules were left in limbo." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1408 (1977) (footnotes omitted).

3. The history of energy-related legislation provides further examples of the paralysis of executive action which is effected by the legislative veto. For instance, the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (1973), gave the Executive Branch power to exempt certain petroleum products from allocation and price controls, subject to a legislative veto. For nearly two years, repeated attempts by the Executive to exercise this delegated authority were frus-

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[36] S. Res. No. 275, 94th Cong., 1st Sess.; 121 Cong. Rec. 31776 (1975).

[37] S. Rep. No. 94-409, 94th Cong., 1st Sess. 3 (1975).

[38] 41 Fed. Reg. 21571, 21591 (1976).

trated by the threat and exercise of this veto power. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1390-92 (1977). Finally, Congress resolved the issue by legislation. *Id.* at 1392.

In sum, experience with operation of the legislative veto, as it has proliferated in the field of administrative rulemaking during the last decade, has amply demonstrated that it prevents the Executive Branch from performing its constitutionally assigned functions. *A fortiori*, the legislative veto can be expected to have a disruptive effect when applied to administrative adjudicatory actions, as in this case now before the Court.

II

THE LEGISLATIVE VETO IS AN INVALID ATTEMPT TO AVOID THE LEGISLATIVE PROCEDURES MANDATED BY THE CONSTITUTION

Even though the legislative veto is invalid on separation-of-powers grounds alone, that doctrine is not—contrary to petitioners' assertions—the sole issue in this case. That issue arises only *as a result* of Congress's failure to observe what petitioners refer to (and dismiss) as "legislative formalities." No one contends that Congress's enactment of a *law* rescinding an agency rule or even revoking an agency order would be unconstitutional insofar as the doctrine of separation of powers is concerned (although issues might be presented under the ex post facto or bill of attainder clauses). Congress has acknowledged power to make or change the programs and policies to be implemented by the Executive, and the only issue is *how* it may do so. The other constitutional points raised by respondents below (evasion of the presidential veto and of the requirement of bicamerality) also turn upon the observance of "legislative formalities." Ultimately, the central issue with respect to the legislative veto is when Congress must follow the procedures for legislation set forth in the Constitution.

During the 145 years of our national history before enactment of the first legislative veto provision (and perhaps the more than 175 years before the first exercise of a legislative veto) it was quite clear when "legislative formalities" had to be observed. As the Senate Judiciary Committee stated in 1897, all of them—not only the requirement of presidential participation, but also the requirement of concurrent action by the two houses—must turn

> "not upon [the] mere form [of the resolutions], but upon the fact whether they contain matter which is properly to be regarded as *legislative in its character and effect*." S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897) (emphasis added).

A. The Invalidation of Executive Action Is Legislative in Character and Effect

The invalidation by Congress of executive action—whether in suspension of deportation or issuance of binding regulations—is action by Congress that is "legislative in its character and effect". The major proportion of federal legislation consists of authorization for executive action; and elimination or repeal of that authorization is a legislative act as well. The legislative veto consists of an announcement in a statute authorizing executive action that Congress reserves the right to eliminate that authorization by a means other than plenary legislation. The announcement might appear plausible in that Congress does not *have* to confer the authorization in the first place—so it would seem Congress may confer it with such limitations as it desires. In law, however, the greater does not always include the lesser. The power to withhold does not import unrestricted power to condition the grant. Congress may, for example, refuse entirely to fund a particular program, but if it chooses to do so it may not limit the beneficiaries to whites, or to Republicans, or in any other fashion that would violate constitutional prescriptions.[39] So also here. To affirm that Congress in a case such as this may withhold the immigration parole power from the Executive is not to establish that it may grant that power with the limitation that it be controlled or withdrawn in an unconstitutional fashion.

In its particular application to rulemaking, the legislative veto is sometimes defended on the ground that the congressional action need not follow constitutional requirements for legislation because it makes no change in the law. To the contrary, it is asserted, vetoing a rule prevents a change of law from occurring. This argument does not use the ambiguous term "law" in the relevant sense. Used in one sense, law is the body of governmental prescriptions binding upon the public, including agency rules—so that violation of a valid INS regulation is said to be a "violation of law". Used in another sense,

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[39] *See, e.g., Sherbert v. Verner,* 374 U.S. 398 (1963).

law connotes only those prescriptions that are the work of Congress, many of which empower or restrict the Executive Branch of government but do not affect citizens directly—so that a valid INS regulation is said to be "authorized by law". It is possible to "change the law" in one of these senses without changing it in the other, but only a change in the legislature-made sense is relevant to the need for the constitutionally prescribed procedures. Thus, when an agency issues a new regulation, the law is not changed in the legislature-made sense even though there is a change in the law that binds the public. On the other hand, when Congress repeals a rulemaking authorization, the law is changed in the legislature-made sense even though the law binding upon the public may be unaffected—as would be the case if the rulemaking authorization had not been used by the authorized agency.

The exercise of a legislative veto makes the same sort of change in legislature-made law as repeal of a rulemaking authorization, because forestalling implementation of a valid rule is equivalent to rescinding the statutory authorization for that rule. While in the enabling statute that confers authorization for a rule Congress can give notice (through inclusion of a legislative veto provision) that it reserves the unilateral right to rescind, the exercise of a legislative veto is no less a rescission, no less a "change in the law" in the relevant sense. Congress's advance specification that it intends to disregard constitutionally required procedures in no way renders that disregard more permissible. *Cf. Smith v. Maryland,* 442 U.S. 735, 741 n.5 (1979).

B. The Acceptance of Executive Recommendations Is Legislative in Character and Effect

Petitioners advance another interpretation of the legislative veto provision at issue in this case. According to the House brief, "[a]t no point . . . has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens shall be allowed to remain in the United States . . . . Congress has retained that power unto itself". (House

Br. 28) The Senate brief argues that "[t]he nature of the Attorney General's role" is "recommendatory", and in accepting or rejecting the Attorney General's "recommendation", "the Congress exercises its own judgment whether permanent residence should be granted." (Senate Br. 29, 30)

Such a characterization is not consistent with the language and structure of Section 244(a), delegating the power of status determination to the Attorney General.[40] Even if it were, however, there is no reason why it would alter the case. It amounts to an admission that the very same congressional "judgment whether permanent residence should be granted", which used to be made through the normal legislative process in the consideration of private bills, is now made through the legislative veto process. It is impossible to understand how that

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[40] In this case, the Attorney General suspended deportation pursuant to subsection (a) of Section 244, 8 U.S.C. § 1254, which provides, in part:

> . . ."[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
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> (1) is deportable . . . ; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien . . . ."

The House of Representatives then vetoed the Attorney General's suspension order pursuant to subsection (c) of Section 244, which states:

> "(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—
>
> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

action can be "legislative in its character and effect" in one instance but not in the other.

To put the matter another way, what—other than Congress's own fiat in Section 244(c)—permits Congress to accept the Attorney General's "recommendation" through pure inaction, though it can only accept the recommendations of its own staff through the enactment of legislation? Or may it extend this technique to the recommendations of its staff as well? The idea is not as far-fetched as it might seem. Since its relatively recent birth in 1932, the legislative veto has been progressively extended from action (or "recommendation") by the President,[41] to action by his subordinates (*e.g.*, the legislation at issue in the present case, involving action by the Attorney General), to action by independent agencies,[42] to action by this Court (the legislative veto of Court-adopted amendments to the Federal Rules of Evidence[43]), to action by a federally chartered corporation that is a federal instrumentality,[44] to action by a federally chartered corporation that is *not* a federal instrumentality.[45]

* * * *

In short, neither of petitioners' suggested theories suffices to explain why the legislative veto is entitled to dispensation from normal legislative procedures. Viewed as a device to elicit executive "recommendations" to Congress, it runs afoul of the requirement for the constitutionally prescribed procedures when those recommendations are accepted. And viewed as a

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41 *See* Act of June 30, 1932, ch. 314, 47 Stat. 414 (1932).

42 *E.g.*, Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

43 *See* Federal Rule of Evidence 1102, 28 U.S.C. § 2076 (1975).

44 *See* Pennsylvania Avenue Development Corporation Act of 1972, Pub. L. No. 92-578, 86 Stat. 1266 (1972).

45 *See* Section 8 of the Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90 (1975).

delegation subject to defeasance, it runs afoul of the requirement for the constitutionally prescribed procedures when the action effecting the defeasance is taken. Nor does it save the veto process in the present case to describe it as "nothing more than a request for legislative mercy". (House Br. 40) Legislative mercy, like legislative justice, or for that matter legislative severity, must be meted out by legislation.

III

THE LEGISLATIVE VETO UNCONSTITUTIONALLY AUGMENTS THE COMBINED POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

There runs through the House and Senate arguments in this case—as there runs through most arguments seeking to justify the legislative veto—the notion that, after all, the Executive is not really harmed. "Section 244," the Senate brief asserts (Senate Br. 28), "augments, and in no manner infringes upon, executive power." Before 1940, after all, the Executive had no role (except through the President's participation in the legislative process) in the canceling of deportations; now, it has "the important but limited role of suspending deportations and reporting to the Congress." (Senate Br. 29) Moreover, since the cancellation only occurs when the President (who, through the Attorney General, proposes it) and both houses (which, through failure to veto, approve it) *agree,* it is in effect legislation in reverse. Therefore the Executive is not harmed; therefore the principle of separation of powers is not violated; and therefore the device is constitutional.

It is not clear, however, that as a general matter the Executive is not harmed by the legislative veto. Viewed in a realistic fashion, it is impossible to say that the device does not profoundly affect the balance of powers between the first two branches. With respect to the vast majority of executive authorizations to which the legislative veto has been attached, the choice is not between no executive authorization and executive

authorization with a legislative veto. Congress has, to be sure, the *power* to withhold the authorization unless the veto is attached to it; but as a practical matter it will not often do so. For example, the realistic choice is not whether the Environmental Protection Agency will have rulemaking functions with the legislative veto attached or no rulemaking functions at all; it is whether EPA rulemaking, which is sure to exist, will or will not be encumbered by the veto. The same may be true of the Attorney General's function at issue in the present case.

But even if the Executive were not harmed, the legislative veto would nonetheless distort our system of government. The "legislative formalities" set forth in the Constitution, which in Article I, Section 7 give the President a role in the legislative process, do serve to protect the Executive against encroachment upon his powers. More importantly, however, those formalities were designed to protect the people. The damage done to the people by ignoring them happens to be greatest when the damage done to the Executive is least—that is, when it is indeed true that if the President had not received the delegated authority subject to a legislative veto he would not have received the authority at all. In these situations, Congress and the Executive sometimes have combined to erect a structure that will deprive the people of their democratic right to have their representatives *vote* on major, often controversial, changes from the status quo—changes which Congress has not unconditionally approved, but which it later approves by inaction, in declining to veto the Executive's "proposal."

Congress may "reserve the decision to itself" instead of committing it to the Executive, but if Congress considers the decision that important, then *when* it decides, it must do so with observance of legislative formalities that include not merely Presidential participation in its decision (through Article I, Section 7) but also affirmative action by both houses. The Founding Fathers were not unaware that this was a cumbersome process, in which the forces of factionalism, regionalism, institutional jealousy and personal ambition would render legislative action difficult. But they regarded it as

a necessary assurance against not merely the weakening of Executive authority but also the impairment of minority rights and, quite simply, ill-considered legislation.

> "Another advantage accruing from this ingredient [of equal State representation] in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial . . . . But . . . as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation." *The Federalist*, No. 62, at 417 (J. Cooke ed. 1961) (J. Madison).

The Constitution does not provide that this cumbersome, bicameral, affirmative legislative process can be avoided, or converted into a process of mute legislation, by an Act of Congress "reserving its decision", nor even by mutual agreement between the Legislative and Executive Branches.

IV

The Legislative Veto Is Not A Needed Means Of Congressional Control

Evaluation of the legislative veto's constitutionality should not be influenced by the mistaken belief that it is an essential device of modern government.

Petitioners contend that Section 244(c) is one of the "hybrids that work"; that it has "benefited thousands of deportable aliens over the past forty years"; and that it has "served an entirely beneficial purpose." (Senate Br. 24) But if, as petitioners suggest, that purpose were merely to permit congres-

sional acceptance of executive "recommendations," could not those recommendations have been presented in the form of proposed bills as the Constitution envisions? The houses of Congress could even modify their procedures to permit expedited consideration of such recommendations, so that the proposed bills would be (almost always) routinely passed—just as under Section 244(c) the legislative veto is (almost always) routinely not exercised. Nothing of substance would be lost except the ability of Congress, under the present arrangement, to "accept" the recommendations without acting upon or even considering them.

In the present era of broad delegation of rulemaking authority to administrative agencies, the legislative veto is sometimes portrayed as an indispensable means of reasserting the power of a Congress that is displeased with agency excesses but that has no means available for "getting control of the bureaucracy." This portrayal, while generous in its treatment of Congress, is not accurate. Congress has at hand numerous means of control. It may, of course, legislate with more specificity in the first place. It may reverse agency rules by legislation—a course it pursued, for example, with respect to Department of Transportation automobile seatbelt requirements.[46] It may by legislation stay agency rulemaking and restrict agency authorization—a course it pursued recently with respect to the Federal Trade Commission.[47] It may decline to authorize or appropriate funds for agency rulemaking that it disapproves.[48] Instead of conferring authority to promulgate rules, it may confer authority to propose legislation—which

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[46] *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, 88 Stat. 1470 (1974).

[47] *See* Federal Trade Commission Improvements Act of 1980, §§ 7, 11, 19, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[48] *See, e.g.*, Act Making Appropriations for the Departments of Labor, and Health, Education and Welfare, and Related Agencies for Fiscal Year 1974, Pub. L. No. 93-192, 87 Stat. 746 (1973).

was the power it originally granted to the Federal Trade Commission.[49] Or it may subject rulemaking to a "report and wait" provision, requiring the rule's effective date to be delayed for a specified period, during which Congress may act to stay or reverse it.[50]

Besides these direct means of congressional control, many indirect means are available. The reality of government is that every item for which an agency requires congressional action—from authorization for new programs, to funding for old ones, to appointment of new officials—can be made the occasion for congressional influence upon any activities of the agency. The agency's continuing dependency upon Congress assures that congressional reports and investigations, committee recommendations, speeches on the floor, even suggestions from individual members of the agency's oversight or appropriations committees, are rarely ignored. In short, the notion that the legislative veto fills some large gap in Congress's power to perform its legitimate functions is without foundation.

While there may be problems in Congress's monitoring of the administrative government it has created, those problems appear traceable not to a lack of adequate means but to (1) the sheer volume and diversity of broad authority delegated to a multitude of specialized agencies,[51] and (2) the compartmentalized nature of the congressional committee structure, which generally requires legislation pertaining to an agency to be brought to the floor by a committee and staff whose point of

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49 Act to Create a Federal Trade Commission, § 6(f), 38 Stat. 717 (1914).

50 *See, e.g.*, Act to Amend the Education of the Handicapped Act, § 620(b), 89 Stat. 773, 20 U.S.C. § 1411 note (1975). This was a technique used by Congress when it acted through legislation to stay, and ultimately to revise in some respects, this Court's proposed Rules of Evidence. *Compare* Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973), *with* Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926 (1975).

51 *See* ABA Commission on Law and Economy, *Federal Regulation: Roads to Reform*, ch. 5 (1979).

view is likely to be as specialized as that of the agency itself. Far from solving these problems, the legislative veto may well aggravate them. Its existence serves to encourage broader and vaguer delegations by the implicit promise (which, as a practical matter, can rarely be redeemed) that actions pursuant to those delegations will be scrutinized by Congress; and its major effect is augmentation of the power of congressional committees and their staffs.[52]

Conclusion

A member of Congress might vote for a legislative veto of executive action on one or more of three grounds, each of which demonstrates the constitutional defect in its exercise:

1. He might wish to veto the executive action because he believes that action to be contrary to or in excess of the legislated intent of the Congress that passed the original statute; but that is to say that the executive action is violative of law—an interpretive function which belongs to the courts and not to the legislature.

2. He might wish to veto the executive action because, although he believes that action to be in accord with the legislated intent of the original statute and therefore not unlawful, he simply disagrees with the manner in which the executive's discretion under that statute has been exercised; but that is usurping the Executive's authority under the original statute (and it can surely make no difference that Congress served notice in the original statute that it intended to usurp).

3. He might wish to veto the executive action because he believes the legislated intent of the Congress which passed the original statute is, in the light of experience, unwise and that the scope of the Executive's discretion should be altered; but

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52 *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

that requires an act of legislation which must observe the required constitutional "formalities".

For these reasons, The American Bar Association, as *amicus curiae,* respectfully requests that the Court affirm the judgment entered by the United States Court of Appeals for the Ninth Circuit on December 22, 1980.

Dated: January 8, 1982

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